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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted] 714

NATIONWIDE TRAILER RENTAL SYSTEM, INC., GEORGE A. CROFT, SR., and A. E. SIMON, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal from the United States District Court for the District of Kansas

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The District Court entered no opinion on its final judgment nor on the order denying appellants' post-decree motions, the actions herein appealed. The District Court's Findings of Fact and Conclusions of Law, Final Judgment, Order staying judgment pending appeal and Order denying appellants' post-decree motions are attached hereto as Appendix A.

JURISDICTION

This suit was brought under Section 1 of the Sherman Act, 15 U.S.C. § 1. (Act of July 2, 1890, 26 Stat. 209, as amended).

Appellants appeal from the Final Judgment of the United States District Court for the District of Kansas, entered on February 7, 1956, and stayed pending appeal, and from an Order entered by that court on January 7, 1957, denying appellants' post-decree motions under Rules 52(b) and 59 of the Federal Rules of Civil Procedure, the said judgment holding that appellants have combined and conspired to restrain competition in interstate commerce in one-way trailer rentals, in violation of Section 1 of the Sherman Act, as appears from a copy of the judgment attached hereto. Notice of appeal to this Court was duly filed in the United States District Court for the District of Kansas on March 6, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. § 29, as amended. The following decisions, among others, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Line Material Co., et al.*, 333 U.S. 287 (1948); *United States* v. *Griffith, et al.*, 334 U.S. 100 (1948); *Ethyl Gasoline Corporation* v. *United States*, 309 U.S. 436 (1940).

QUESTIONS PRESENTED

Appellant Nationwide Trailer Rental System (hereinafter referred to as NTRS) is a non-profit mutual benefit corporation. Its members are small businessmen who own trailers which are rented to automobile

owners. Its function is to provide an organization of trailer owners which can keep the trailers of its members circulating through a nationwide cooperative system.

The questions presented are (a) whether such an organization violates the antitrust laws when it suggests, without requiring compliance, the rates which its members may charge, and (b) whether it is guilty of illegal boycott when it refuses to admit and incorporate into its system all qualified owners of trailers who apply.

STATEMENT OF THE CASE

A. The District Court's Findings of Fact

The findings of fact of the court below may be summarized as follows:

Appellant, NTRS, is a non-profit, mutual benefit corporation organized under the laws of Michigan. The individual appellants, A. E. Simon and George A. Croft, Sr., are members and former officers of NTRS. (Findings of Fact, pars. 1 and 2). The various members of NTRS are engaged in the "one-way" trailer rental business, the trailers involved being two and four-wheel trailers of a size suitable and intended for hauling by private automobile. In the normal course of business, automobile owners rent trailers from NTRS members to haul their personal goods. The "one-way" rental feature of the business requires a system of cooperating stations which permit the trailer renter to haul the trailer to his destination and leave it with another trailer rental station at that place, thus circulating the trailers from station to station. (Findings of Fact, par. 4).

The record shows that for a long period prior to 1945 trailers had been rented on a local basis. Between 1945 and 1950 the "one-way" trailer rental system developed in a loose fashion through the exchange and circulation of trailers by individual agreements between trailer rental stations in different cities. To accommodate the flow of trailers lists of operators willing to accept trailers on a one-way basis from others were compiled. The trailers remained then as now the property of the original owners. (Findings of Fact, pars. 6 and 7). The loose method used in this period for circulating trailers was cumbersome, disorganized and unsatisfactory. (Findings of Fact, pars. 7-11).

In 1950 certain of the trailer operators conceived the idea of formulating a single list of one-way operators. A meeting of trailer operators was called for the purpose. After an abortive effort to this end, appellant NTRS was formed in 1951. (Findings of Fact, pars. 12-14).

Due to the disparity between the number of trailers in circulation by various member operators, the membership in NTRS was divided into classes, Class "A" members being those having a minimum of ten active trailers and Class "B" those having less than ten. Class "C" stations owned no trailers but conducted rental businesses as subsidiaries of Class "A" members (Findings of Fact, par. 17).

Under the By-Laws of NTRS no member of NTRS may be connected with a competing one-way rental system. Further, a member of NTRS is protected against other applications for membership in NTRS within his immediate vicinity. (Findings of Fact, par. 15).

The record shows that a uniform lease agreement was adopted by NTRS for use by NTRS members containing a provision for an overtime rental charge and the amount to be charged therefor. The District Court found that "[T]here was no evidence that any operators *did not* use this lease form" (Emphasis supplied; Findings of Fact, pars. 21 and 22).

The record also shows that a suggested rate schedule was adopted by NTRS and circulated to all members which provided for certain rates in certain zones within specified distances of an operator's station. (Findings of Fact, pars. 21 anod 23). The trial court was most explicit in its finding as to the use, or better, lack of use, of the suggested rate schedule. It found as follows:

> "As regards the above referred to 'price list', *the evidence was and it is specifically found as a fact that the members of NTRS did not strictly adhere to the price list. Nor was there any punishment ever inflicted for deviation. In fact, no evidence of any agreement to adhere to the price list was introduced.* The price schedule was 'adopted' by the association. The schedule itself was referred to carefully by the defendants as a 'suggested' price schedule. *The extent of the agreement concerning the price list was that it be circulated to all members.* Several witnesses characterized the price list *as a guide,* 'something to go by'. *The Court is unable to find that the list was circulated for no purpose at all.*" (Emphasis supplied; Findings of Fact, par. 24)

At the time of the trial there were approximately 30,000 trailers in "one-way" use in the United States, more than one-third of which are owned by NTRS members and which circulate in the NTRS system.

As of the close of the record NTRS was composed of 168 Class "A" members, 63 Class "B" members and 524 Class "C" stations located in 46 states and the District of Columbia. (Findings of Fact, pars. 26-27).

B. The District Court's Conclusions of Law

Based upon the foregoing findings of fact, the District Court concluded that the By-Laws and rental illustrations of NTRS constitute an agreement between appellants and that a substantial portion of the one-way trailer industry is affected by the agreements. (Conclusions, pars. 3, 6).

The court further concluded that Article IV, Section 3, of the NTRS By-Laws[1] constitutes a *per se* violation of Section 1 of the Sherman Act in that it provides for a boycott by establishing exclusive territories for each member and empowering that member to prevent any other operator from becoming a member in his area and thereby competing for the business of the other members of NTRS. (Conclusions, pars. 7, 9).

Finally, the District Court concluded that appellants "are engaged in a price fixing scheme which is illegal per se in two particulars": (a) The overtime rate is uniformly charged by all operators and is a part of the printed lease form, and (b) the "publication, adoption, and circulation of the [suggested rate]

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[1] Article IV, Section 3 provides as follows:

"ARTICLE IV entitled 'Application for Membership'. Section 3: A member shall be protected from any application within his city or immediate vicinity as long as there are no official complaints against him. Unless the member consents, in writing, it shall be the duty of the secretary to deny such applications." (Findings of Fact, par. 15)

schedule, while not fixing a rigid price, was such a tampering with prices as is forbidden by the Sherman Act." (Conclusions, par. 8).

C. The District Court's Final Judgment and Its Effect on NTRS

To alleviate these alleged restraints, the District Court's Final Judgment, from which this appeal is taken, enjoins and restrains appellants from: adopting, continuing or adhering to any by-law, rule or other instruction which requires an operator to follow a suggested rental rate schedule; establishing exclusive territories for one-way operators or preventing or restricting any person from engaging in the one-way trailer business at the place of his choosing; restricting or preventing any person from dealing with any other person engaged in one-way trailer rentals; and restricting or preventing any person from joining or remaining a member of any association or organization of one-way operators. (Final Judgment, par. V).

The decree further orders and directs appellants to grant uniform and non-discriminatory membership in NTRS to any one-way operator providing he agrees to meet his financial obligations and to meet and maintain adequate safety standards and, further, to amend its by-laws regarding expulsion of members and otherwise to bring the by-laws, rules, lease forms and rental instructions into conformity with the court's judgment. (Final Judgment, par. VI).

The decree places NTRS at a serious competitive disadvantage with its largest competitor, a trailer system already much larger than NTRS. Appellants' principal competitor in one-way trailer transportation is a private, profit-making stock corporation operating with its subsidiaries under the name of

U-Haul. As such it is not bound to share with non-stockholders its good will and facilities for circulating trailers. The decree compels appellant to share its good will and facilities with everyone, including its competitors and those who seek that status. Appellants are compelled to share the benefits of their enterprise, their advertising, their capital and their good will built up over a period of years with anyone who wants to take advantage of this valuable property.

The decree further restrains NTRS from preventing its own members from joining competing associations while at the same time rendering membership in NTRS so unattractive that defection from NTRS is almost certain to occur. It thus deprives NTRS of any control over the growth or expansion of its system and the efficient location or number of its rental stations. It compels members of NTRS to forward trailers to persons who have divided loyalties because they belong to competing systems. Indeed, it requires NTRS to make its system available to non-competitors in order that they may become competitors of the NTRS members.

The prosperity of NTRS depends on the willingness of its members to remain such and to buy new trailers to feed into the system as the old ones become obsolete. This is profitable only if there are carefully selected stations in key areas, each with enough business so that the owners can devote a large part of their time to selling trailer service. It requires undivided loyalty to the system. It requires advertising and sales effort. When control over the selection and location of the stations in the system is taken away from the management; when the persons who build up, by advertising and sales effort, a valuable organization

must share that property with every newcomer who applies, it must be obvious that there will be no incentive for further membership or investment in such an organization.

In short, the decree destroys the value of membership in NTRS and its opportunity to keep up with its competition by attracting new capital. With its largest competitor, U-Haul, free of these restrictions, the result will almost surely be the ultimate deterioration rather than the strengthening of competition in the trailer rental business.

D. The Grounds for Appeal

(1) On the basis of the District Court's own findings there is no support for its conclusion that appellants are engaged in an illegal price fixing scheme.

The District Court found that the By-Laws and rental instructions of NTRS constitute agreements among its members. There are, however, no by-laws relating to rates or prices. The only findings relating to rates or prices were those concerning the uniform lease form which contained an overtime rate and the suggested rate schedule.

With respect to the uniform lease, the District Court made a negative finding to the effect that "there was no evidence that any operators *did not* use this lease form". (Emphasis supplied; Findings of Fact, par. 22). It made no affirmative finding of fact that the NTRS operators *did* use a uniform overtime rate although it assumed without evidence that they did. (Conclusions, par. 8).

As to the suggested rate schedule, the court below made the explicit finding that "the members of NTRS

did not strictly adhere to the price list . . . [i]n fact, no evidence of any agreement to adhere to the price list was introduced . . . [t]he extent of the agreement concerning the price list was that it be circulated to all members." (Findings of Fact, par. 24).

The court has thus specifically found that there was no price fixing scheme. On the record, no other finding was possible. The Government called no witnesses; it relied wholly on the introduction into evidence of the lease form and rent schedule. There was no evidence whatsoever that these guides were actually used or that they even affected prices in any way. The finding that no agreement existed is supported by the uncontradicted testimony of members of NTRS that they did not adhere to or even use the prices suggested or circulated by NTRS. All the witnesses who testified on this point stated unequivocally that, of their own knowledge, each operator fixed his own prices solely in accordance with his own judgment. See testimony of Mr. Schunck (Tr. 451-452), Mr. Croft (Tr. 582-583), Mr. A. E. Simon (Tr. 624-625, 647, 648), Mr. Ralston (Tr. 687-688, 712-714), Mr. Ridenour (Tr. 732, 739-740) and Mr. Barton (Tr. 779).

The evidence refutes the charge of conspiracy to fix prices. Certainly no presumption or inference of guilt can be derived from the mere circulation of a suggested price list—such action, without more, cannot be prima facie evidence of guilt. *Maple Flooring Mfgs.' Ass'n.* v. *United States,* 268 U.S. 563, 583-586 (1925); see also, *Cement Mfgrs.' Protective Ass'n.* v. *United States,* 268 U.S. 588, 606, (1925).

Moreover, the record is clear that the purpose of NTRS in circulating the list of suggested prices was

one approved by this Court in the *Maple Flooring* case, *supra*. Here it was essential to the intelligent conduct of a one-way trailer business by the numerous small businessmen—filling station operators and the like who are members of NTRS—that they have an estimate of what rates would prove profitable and reasonable in areas to which they send trailers. Without this information it was impossible for them to bargain intelligently with their customers. There was no evidence of an unlawful purpose but rather all of the evidence indicated the adoption of a reasonable and practical procedure dictated by the unusual nature of the business.

(2) The refusal of NTRS and its members indefinitely to expand its system by offering rental stations to all applicants is not an illegal restraint of trade.

One of the essential functions of the management of a one-way trailer system is the location of rental stations at strategic spots. If there are too many in one city the business will be so unprofitable as to take away the incentive to advertise and otherwise promote what is, for most of the members, a part-time business. Even more important, the incentive of the members to buy new trailers to feed into such a system is destroyed.

Membership in NTRS has value because the individual members of this mutual benefit corporation have invested their funds and efforts to build up good will, create efficiency and make it a system from which the public will rent trailers in preference to its competitors. From a business point of view there is no difference between owning stock in an integrated trailer forwarding system and owning a membership

in a mutual benefit organization. The value of the stock would be destroyed if it had to be issued without cost to every newcomer who waited until the concern made a success and then applied. The value of the membership here is gone if it must be diluted by the forced acceptance without payment of all applicants for memberships to the same standing and position as those who built up the system.

No doubt competition might be restrained if NTRS hampered non-members in their efforts to form a competing organization. But there was no evidence of action of this nature. Or, if NTRS controlled enough potential rental stations—garages, filling stations, trailer lots and the like—to make it impossible for a competitor to duplicate its service, an actionable restraint might result. But the record shows that there are 250,000 filling stations and garages available for setting up systems similar to NTRS (Tr. 924) while NTRS rental stations total only 755. (Findings of Fact, pars. 26 and 27). Surely with this plethora of competitive opportunity available, NTRS cannot be under an obligation to spend its time and money for the benefit of would-be competitors.

The total market in which NTRS competes is not the one-way trailer rental market but rather the transportation of personal property by all methods and means. Its competitors are not only the other one-way trailer systems, but vans, trucks, express and freight carriers as well. The competitive advantage of the one-way trailer is the economy of a "do-it-yourself" operation. NTRS, with a third of the trailers in operation in the United States, has only an infinitesimal percentage of the over-all market for the

transportation of household effects and personal property.[2]

Further, when NTRS declines to offer the use of its system facilities to a non-member who owns trailers, it is not interfering with a competitor. For example, a man in Chicago with 20 trailers, and no way of circulating them, is not a competitor and does not compete with appellants. He is no more in the interstate transportation business than a man who has a locomotive but no tracks to run it on is in the railway transportation business. The latter cannot get a decree from any court compelling a railroad to run his locomotive over its track merely because he does not have the enterprise, initiative or capital necessary to build his own railroad.

The only way to enter the field of one-way trailer transportation is to organize a team which can circulate trailers in an interstate area. No one without such a team is in that particular business. To say that once appellants have formed a team they must let everyone play on it is absurd, but that is precisely what the District Court has decreed.

The right of a group of independent businessmen to form a cooperative association to assist them in carrying on their business and to exclude others from the fruits and advantages of that cooperative association has been affirmatively upheld by this Court. *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926).

It is significant to note that in the *Moore* case the defendant had a completely dominant position—in-

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[2] Compare *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956); *Times-Picayune Pub. Co. et al.* v. *United States*, 345 U.S. 594 (1953).

deed, it was alleged that the defendant had a monopoly upon the receipt and dissemination of cotton price quotations, through which prices of cotton were guided and fixed in exchanges and markets throughout the United States. The Odd-Lot Cotton Exchange needed desperately the service which the New York Cotton Exchange refused to give it and which it furnished to persons of its own choice. In contrast, here NTRS has an insignificant part of the total odd-lot transportation market. Indeed, it had only a third of the small one-way trailer segment of that market.

Moreover, the fact that a membership corporation restrains the conduct of its members and requires them to follow certain rules in dealing with outsiders has been held not to be a *per se* violation of the antitrust laws. *Board of Trade of City of Chicago, et al.* v. *United States*, 246 U.S. 231 (1918).[3]

The court made no finding here that NTRS was set up in its present form with intent to restrain competition. No evidence in the record even suggests an intent to restrain competition. And, as we have shown, NTRS cannot by any stretch of the imagination be said to hold monopoly power.

We know of no precedent condemning the formation by independent businessmen of lawful corporate agencies which enable them to compete with large corporations in the market. Certainly the "Rule of Reason" referred to in the *Insurance Board of Cleveland*

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[3] See also *United States* v. *Insurance Board of Cleveland*, 144 F. Supp. 684 (N.D. Ohio, 1956) repudiating the proposition that all refusals to deal are *per se* violations of the Sherman Act as contrary to the "Rule of Reason". *Cf. United States* v. *New Orleans Insurance Exchange*, 148 F. Supp. 915 (E.D. La., 1957.)

case, (see footnote 3, *supra*), would not compel a group which has formed such an agency to provide the same service to outsiders in order that they may become its competitors.

THE QUESTIONS ARE SUBSTANTIAL

The foregoing demonstrates the substantial nature of the questions involved in this appeal and the necessity for their plenary consideration by this Court upon briefs and oral argument.

The lower court's decision, if permitted to stand, will establish the proposition that the mere circulation of a suggested rate schedule, without more, by a group of small independent businessmen, formed for a lawful purpose and without intent to restrain trade and commerce, the circulation of which is essential to the intelligent conduct of their business, is an unlawful price fixing scheme. Further, it will establish the proposition that the antitrust laws may be used to compel a group of small businessmen, joined together in lawful purpose and touching only a minor segment of the market in which they compete, to admit to membership all would-be competitors and to share the fruits of their energy, capital and promotion with those who did not have the energy and initiative to build their own systems although there were ample opportunities and facilities so to do.

Such erroneous legal precedents will be far-reaching in consequence upon the myriad mutual benefit corporations now operating in aid of small businessmen in many business fields. If permitted to stand, they may lead to the unnecessary disruption of numerous such organizations which provide a means by which

small businessmen may compete with larger organizations. The result will most surely be a harmful inroad upon rather than a strengthening of healthy competition.

As Mr. Justice Hughes said in the *Appalachian Coals* case[4]:

> "... We know of no public policy, and none is suggested by the terms of the Sherman Act, that in order to comply with the law those engaged in industry should be driven to unify their properties and businesses in order to correct abuses which may be corrected by less drastic measures. Public policy might indeed be deemed to point in a different direction. If the mere size of a single, embracing entity is not enough to bring a combination in corporate form within the statutory inhibition, the mere number and extent of the production of those engaged in a co-operative endeavor to remedy evils which may exist in an industry, and to improve competitive conditions, should not be regarded as producing illegality. The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is

[4] *Appalachian Coals Inc. et al.* v. *United States*, 288 U.S. 344, 376-377, (1933).

not—makes but an artificial distinction. The Anti-Trust Act aims at substance. . . ."

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Civ. No. W-655

UNITED STATES OF AMERICA, *Plaintiff*

vs.

NATIONWIDE TRAILER RENTAL SYSTEM, INC., GEORGE CROFT, SR. AND A. E. SIMON, *Defendants*

The Court makes the following Findings of Fact and Conclusions of Law in the above-entitled case:

FINDINGS OF FACT

1.

Nationwide Trailer Rental System, Inc., hereinafter referred to as NTRS, is a non-profit corporation organized under the laws of Michigan. Its corporate purpose as stated in the Articles of Incorporation is "To associate together, for their mutual benefit, comfort and instruction not involving direct pecuniary profit, those persons actively engaged in utility trailer rentals."

2.

A. E. Simon is a member of the Defendant NTRS, and at the time of the filing of the complaint herein, August 28, 1953, was its Secretary-Treasurer, George A. Croft is a member of the Defendant NTRS and at the time of the filing of the complaint was its President. Since that time and at the February, 1955 Convention of the Defendant NTRS, new officers have replaced the above-mentioned as such officers.

3.

The defendant Simon is a resident of Wichita, Kansas, and the defendant NTRS and the defendant Croft appeared in court by counsel and also in person in the case

of Mr. Croft. During the time Mr. Simon was Secretary-Treasurer of NTRS, the business of NTRS has been conducted from Wichita, Kansas.

4.

All the members of the defendant NTRS are engaged in what is known as the "one way" trailer rental business. The trailers are two and four-wheel trailers of various sizes suitable and intended for use with private passenger automobiles. In the operation of this business, customers regularly rent these trailers from members of defendant NTRS, and other business men not members of NTRS for use in transporting personal goods and private property from one place to another. The somewhat unique feature of the "one way" business is that the business man who rents the trailer to his customer does not contemplate that the trailer will be returned to him, but through arrangement with other businessmen directs the customer to leave the trailer at another station, at or near the destination of the customer.

5.

This practice of allowing a customer to surrender a trailer to a station other than the one from which it was rented, as described above, originated in California. There is some evidence that there were individuals engaged in the business in California during the period of World War Two. At any rate the evidence shows that between 1945 and 1950, the practice began to find its way into other parts of the United States.

6.

Between 1945 and 1950, trailers were exchanged on a "one way" basis in a rather loose fashion. It appears from the evidence that for a long period of time prior to 1945, individuals had been engaged in the rental of utility trailers on a local basis. These local trailer rental people

were the natural avenues through which the "one way" practice developed. The evidence showed that in the early development of the "one way" business, operators or local business men who had been exposed in one way or another to the one-way idea, w[illegible] they had a customer desiring to rent a trailer on a one-way basis to a given city where the rentor had no contact, would make use of telephone directories and write or otherwise communicate with business men in that city who were engaged in the rental of local trailers.

7.

In this manner, the business man started a trailer out on what he hoped would be a series of "one way" moves. In order to give the business man to whom the trailer was sent some information about where the trailer could be sent on another "one way" journey, trailer owners who had sent their trailers to others on a one-way basis, compiled lists of operators who were willing to accept trailers from others on a one-way basis. The trailers always remained, and do remain under the present system, the property of the original owner.

8.

The transactions outlined in Findings 6 and 7 above happened many times over a period of time beginning about 1945 and continuing at least until 1950, and perhaps longer. As a result more than one "list" came into existence. The evidence is not clear, but it is a fair inference that some operators had agreements with others whereby they were to be mutual recipients of the others' one-way business. Perhaps several operators on a list had that understanding. What is clear from the evidence is that some operators objected to having their trailers sent to certain other operators. This did happen sometimes however. Some operators were on all lists. Occasionally these operators who were on all lists would receive trailers from operators

on one list and then use the wrong list when re-renting the trailer with the result that the owner-operator's trailer passed into the hands of people with whom he did not desire to do business.

9.

In conjunction with the development of the lists and other business practices outlined above, arrangements were made for a division of the rental fee between the rentor and the owner. There was some testimony that with each list of operators there was a price list. There was no testimony concerning the division of rentals during this period.

10.

There was testimony that many trailers which were circulated by these businessmen were not first class trailers and that the operators were unwilling to release their best trailers into the one-way operation. No direct evidence was offered of any specific accidents which occurred as a result of this tendency to circulate trailers of low quality, but there was evidence of near accidents and other road failures.

11.

The evidence showed that while there was never a static period during the development of the business as it spread over the country, eventually there emerged seven lists. These lists were compiled by the larger operators and changed often, perhaps monthly.

12.

The evidence showed that in 1950 a few business men engaged in the circulation of trailers on a one-way basis conceived the idea of the formation of a single "list" of operators willing to exchange trailers with each other. Pursuant to that objective, invitations were sent to individuals to a meeting looking to that end which was to be

in Detroit. This meeting was not well attended. In fact only Mr. M. C. Hansen, an operator located in Detroit, Mr. Bennett of Philadelphia and Mr. Richard Shunk, of Cleveland, were present. The evidence was that not much of any consequence transpired at that meeting, and no evidence of any agreements survives.

13.

After that above referred to meeting had ended, two of the participants, Mr. Shunk and Mr. Bennett, invited trailer operators to a meeting in Indianapolis. Every operator, or nearly every operator whose name was on any of the lists was invited. In all 101 invitations were extended. The evidence was that 26 operators attended the meeting.

14.

As a direct result of this meeting, the defendant NTRS was incorporated; it was incorporated early in 1951. Either at this meeting or at a meeting of the Board of Directors of the newly formed corporation, a set of by-laws were adopted. At the meeting in Indianapolis, the as yet unincorporated association elected officers. These officers became the incorporators and officers of the defendant NTRS.

15.

The following by-laws have been in force in substantially the form set out below at least since the 1952 convention of the association which was held in St. Louis, among other by-laws. (Those set out below are taken from the amended by-laws of the association dated February 11, 1955.)

ARTICLE III entitled "Eligibility for Membership".

Section 1: No member of Nationwide Trailer Rental System may be connected with other one-way trailer rental system in competition with our association members.

ARTICLE IV entitled "Application for Membership".

Section 3: A member shall be protected from any application within his city or immediate vicinity as long as there are no official complaints against him. Unless the member consents, in writing, it shall be the duty of the secretary to deny such applications.

ARTICLE VI entitled "Loss of Qualification".

Section 3: Other Offenses: The Board of Directors of the N.T.R.S. for good cause shown and with notice of hearing, may place a stop order or expel any member from this System if, in the opinion of the Board of Directors, such action shall be necessary to keep this System out of legal entanglements or to preserve the good name and business of the System.

Section 4: Violation of any of the By-Laws of this organization is cause for expulsion from the System. Expulsion shall be only by a two-thirds vote of the Directors or by a two-thirds vote of those present at a regular meeting. Any member expelled shall be given 90 days in which to get his trailers out of the System. Evidence of guilt shall be established by complaints of members of the Nationwide Trailer Rental System. Complaining member must be able to back up his charges with direct and lucid evidence.

Section 5: Members, who sell their trailer business to new owners may transfer their membership to the new owner, providing purchaser meets qualifications set forth in these By-Laws and is approved by the Board of Directors.

16.

The evidence showed that at the outset, it was difficult to induce businessmen to join the newly formed association. This was partly due to the fact that individuals engaged in the local utility trailer rental business were unfamiliar with the "One-Way" operation and principle and partly due to the fact that some towns where NTRS desired a

representative had no utility trailer people in business there at all and therefore no prospects for membership in NTRS.

17.

The evidence also showed that many operators had a few trailers in the system or being circulated while others had a great many. Due to the disparity between the number of trailers in circulation by the various members, and the situation as outlined in Finding 16, at the St. Louis Convention referred to in Finding 15, members of NTRS were divided into classes. This classification appears to have undergone changes after its initiation, as more fully appears hereafter. Immediately below are the current by-laws of the association relative to the classification of members.

ARTICLE V entitled "Classification of Membership".

Section 1: Every member shall own one station in the one-way rental system.

Section 2: CLASS A MEMBER: All individuals, firms or corporations conducting a trailer rental business and having a minimum of ten trailers active in the N.T.R.S. and approved by the Board of Directors.

Section 3: CLASS B MEMBER: All individuals, firms or corporation (s) conducting a trailer rental business not having a minimum of ten trailers in the N.T.R.S. Limitations on One-Way Trailers: "B" members must have the approval of the Board of Directors in order to put ten or more trailers into the one-way system.

Section 3a: Six (6) months from the passage of this amendment, present "B" members shall not be able to change their status to "A" members until the next convention. With the exception of the previous section, no changes to "A" status shall be made between the passage of this amendment and the next convention.

Section 4: CLASS C Stations: All individuals, firms or corporations conducting a trailer rental business as a subsidiary station of a Class A member by authority of the Board of Directors.

ARTICLE X entitled "Voting and Elections".

Section 1: Each Class "A" member shall have one vote upon all questions presented for any action at any meeting of the members.

Section 2: There shall be no vote for any Class "B" member at any meeting.

Section 3: There shall be no vote or voice for any Class "C" station at any meeting.

18.

As indicated in previous findings, the above by-laws represent the present status of members. It appears from the evidence that there was a time when "B" members were voting members and when what are now referred to as "C" stations, were considered members, although they may not have had any vote in convention meetings. It also appears from the evidence that prior to the passage of the by-laws in their present form, in February, 1955, "B" members could become "A" members simply by placing 10 or more trailers in circulation.

19.

The association has a Board of Directors and an Executive Committee. The Board of Directors are elected from among the "A" members and two of the members of the Board of Directors serve on the Executive Committee which has three members, the third being the President of N.T.R.S.

20.

The Board of Directors is empowered by the By-Laws to make rules for N.T.R.S. They are empowered to grant authority to the Executive Committee except that the Executive Committee shall not be given authority to expel a member or grant a membership.

21.

Pursuant to the authority contained in the By-Laws, various rules and other items germane to this lawsuit were adopted by the Board of Directors or proposed by them and adopted by the membership in convention. A uniform lease agreement was adopted for use by the members. A suggested rate schedule was adopted and circulated to all members. The rate schedule was revised at least once and the one currently in effect is what is known as a "zoned rate schedule" in the business.

22.

The current lease form contains a lease agreement which is used by all operators, who are members of NTRS. Also, printed on the lease form itself and a part of each leasing contract is a provision for overtime charge and the amount which will be charged therefor. There was no evidence that any operators did not use this lease form. It is supplied to the operators free of charge by NTRS.

23.

The current "rate schedule" establishes "zones" from which a rate is obtained. Each operator, to use this chart, would "zone" a map of the United States, and number the zones outward from his city beginning with one (1). Each zone is roughly 135 miles from border to border. In other words, a series of concentric circles with the operator's home town as the center of each circle (on a map) would be first drawn. Then, a rent figure could be established quickly by simply observing the zone of the destination city on the map.

24.

As regards the above referred to "price list", the evidence was and it is specifically found as a fact that the members of NTRS did not strictly adhere to the price

list. Nor was there any punishment ever inflicted for deviation. In fact, no evidence of any agreement to adhere to the price list was introduced. The price schedule was "adopted" by the association. The schedule itself was referred to carefully by the defendants as a "Suggested" price schedule. The extent of the agreement concerning the price list was that it be circulated to all members. Several witnesses characterized the price list as a guide, "something to go by". The Court is unable to find that the list was circulated for no purpose at all.

25.

The Board of Directors have adopted rental instructions which require the members to divide the rental fee in accordance with a fixed rule. The Defendant NTRS receives for operating expenses 5% of all rental fees collected. The remainder is divided between the renting station and the owner.

26.

At the time of the trial of this case, the evidence showed that there were upwards of 30,000 trailers circulating in the one-way business in the United States at that time. More than one-third of these trailers are owned by members of the defendant NTRS and circulate exclusively in that system.

27.

At the close of the evidence, the latest figures on the membership of the defendant NTRS were offered in evidence. Those figures are as follows: Class "A" Members 168, Class "B" Members 63, Class "C" Stations 524. These members are located in 46 states and the District of Columbia. One member of NTRS testified that an average trailer would make 15 moves a year. These trailers are regularly taken by customers from state to state.

Conclusions of Law

1.

This court has jurisdiction of the parties and the subject matter of the action pursuant to 15 U.S.C.A. § 9 & 22.

2.

The defendants are engaged in interstate commerce.

3.

A substantial portion of the One-Way trailer industry is affected by the agreements under consideration.

4.

The complaint charges a violation of the Sherman Anti-Trust Act, Section 1, 15 U.S.C.A. § 1. It is not necessary that all the parties to an agreement or combination be made defendants in an action of this type, it is enough if the non-defendant parties to the alleged violation are sufficiently identified as to satisfy the requisites of fair notice of what is charged in the pleadings.

5.

The defendant NTRS is not an integration of the business of its members. It is not a sole marketing or selling agency through which its members operate. It is rather an organization for the "mutual benefit, comfort, and instruction" of its members.

6.

The individual defendants and all the other members of NTRS must be considered as individual business units. The By-Laws of the defendant NTRS constitute an agreement between the defendants. By virtue of the by-laws, rental instructions issued by the Board of Directors and the Executive Committee are also agreements between the members.

7.

Article IV, Section 3, of the By-Laws of NTRS violates the Sherman Act, 15 U.S.C.A. § 1, in that it establishes exclusive territories for each member and empowers that member to prevent any other operator from becoming a member in his area, and thereby competing for the business of the other members of the defendant NTRS.

8.

The individual defendants and the members of the defendant NTRS are engaged in a price-fixing scheme which is illegal per se in two particulars. The rate charged for overtime use of trailers is uniformly charged by all operators and is a part of the printed portion of the lease agreement. The Court concludes that the publication, adoption, and circulation of the schedule, while not fixing a rigid price, was such a tampering with prices as is forbidden by the Sherman Act.

9.

Article VI, Section 3, violates the Sherman Act by providing for a boycott. This By-Law is a violation of the act per se.

10.

The Nationwide Trailer Rental System, Inc. is in effect an extra-governmental body seeking to regulate the One-Way Trailer Rental Industry represented by its membership.

It is suggested by the Court that no decree be prepared and entered at this time but that the case be set down for arguments of counsel as to the nature of the decree to be entered on the basis of the foregoing Findings of Fact and Conclusions of Law.

s/ DELMAS C. HILL
Judge

ENTERED
JULY 2, 1955

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Civil Action
No. W-655

Entered February 7, 1956

UNITED STATES OF AMERICA, *Plaintiff*

vs.

NATIONWIDE TRAILER RENTAL SYSTEM, INC., GEORGE A. CROFT, SR. AND A. E. SIMON, *Defendants*

Final Judgment

Plaintiff, United States of America, having filed its complaint herein on August 28, 1953; the defendants having appeared herein and filed their answers to said complaint on October 22, 1953 and their amended answer on April 15, 1954; and this cause having come on for trial March 7, 1955, and said trial having been completed March 16, 1955; and the Court having filed its findings of fact and conclusions of law on July 2, 1955.

NOW THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of the parties hereto. The complaint states a cause of action against the defendants and each of them under Section 1 of the Act of Congress of the 2nd of July 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Final Judgment:

(A) "One-way trailers" means any two or four-wheel trailers of various sizes suitable and intended for use with

passenger automobiles, to transport personal goods and other property from one place to another. One-way trailers do not include housetrailers.

(B) "One-way trailer rentals" means rentals of trailers made under terms and conditions which enable the renter to surrender the trailer to an operator at a designated station in the city of the renter's destination.

(C) "Operators" means owners of one-way trailers who operate lots at which one-way trailers are rented or returned.

(D) "Class C stations" means individuals, firms or corporations not owning any one-way trailers but conducting a trailer rental business as a subsidiary station or agent of an operator who is a member of defendant Nationwide.

(E) "Nationwide" means Nationwide Trailer Rental System, Inc., a defendant in this cause.

III

The defendants, and each of them, have violated and are now violating Section 1 of the Act of Congress of July 2, 1890 (26 Stat. 209, 15 U.S.C. Sec. 1) entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended, commonly known as the Sherman Act, by engaging in a combination and conspiracy to restrain competition in the trade and commerce among the several States of the United States in one-way trailer rentals.

IV

The provisions of this Final Judgment applicable to defendant Nationwide shall apply to that defendant and to the officers, directors, agents, members, employees, successors and assigns of said defendant.

V.

The defendant Nationwide is enjoined and restrained from:

(A) Adopting, continuing, enforcing or adhering to any by-law, regulation, instructions, rule, requirement, understanding, plan or program which, directly or indirectly, requires or suggests that any operator shall follow or adhere or conform to any list or schedule of rental rates or of suggested rental rates for one-way trailers, or by any other means fixing, determining, suggesting or maintaining rates or other terms or conditions for rental of one-way trailers; *provided*, however, that any one-way trailer operator, as to trailers owned by him, may determine and communicate to other one-way trailer operators the rate or rates at, and the terms and conditions under which such one-way trailers may be rented or the rentals divided between the owner and the renter of such trailers; and *provided*, further, that the defendant Nationwide may provide that each member receiving rentals for one-way trailers owned by any other member or by any non-member shall pay a certain, uniform part or percentage of such rentals to the trailer owner;

(B) Establishing or allocating exclusive territories or exclusive locations for one-way trailer operators, or in any other manner restricting, or preventing, or attempting to restrict or prevent any persons from engaging in the trade of one-way trailer rentals at any place or places of his choosing;

(C) Restricting or preventing, or attempting to restrict or prevent any person from dealing with any other person or group of persons engaged in the trade of one-way trailer rentals;

(D) Hindering, restricting, or preventing any person from joining or remaining a member of any association or organization of one-way trailer operators.

VI

Defendant Nationwide is ordered and directed to:

(A) Grant uniform and non-discriminatory membership in Nationwide, upon written application therefor, to any one-way trailer operator; *provided* that the applicant;

(1) agrees to meet and meets his financial obligations to defendant Nationwide, to members of said defendant, and to the public; and

(2) agrees to maintain and maintains adequate standards for the safety of one-way trailers.

(B) Provide in its by-laws that any member of Nationwide may be expelled only upon substantial proof to the Board of Directors of defendant Nationwide that such member:

(1) substantially violated the lawful by-laws of Nationwide; or

(2) failed to fulfill his financial obligations to Nationwide or its members.

(C) Provide in its by-laws that a member may be suspended temporarily by the Board of Directors and expelled by a majority of the members present at a meeting; *provided* that such member be given notice, a hearing, and the right to appeal from a suspension, and that, upon his request, the Board of Directors shall put the matter of his expulsion on the agenda of the first membership meeting following such request;

(D) Within 120 days after the date of entry of this Final Judgment, to amend its by-laws so as to bring them into conformity with this Final Judgment;

(E) Within 60 days after the date of entry of this Final Judgment to eliminate from its Rules, Lease Forms, and

Rental Instructions any provisions that are inconsistent with the provisions of this Final Judgment;

(F) Within 30 days from the date of entry of this Final Judgment to mail to each of its present members and to each existing Class C station a copy of this Final Judgment;

(G) For a period of five years commencing on the date of entry of this Final Judgment, to mail a copy of this Final Judgment to each new member and to each newly created Class C station.

VII

For the purpose of securing compliance with this Final Judgment and for no other purpose, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and upon reasonable notice to the principal office of defendant Nationwide, be permitted, subject to any legally recognized privilege:

(A) access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, minutes, and other records and documents in the possession or under the control of said defendant relating to any of the matters contained in this Final Judgment, and

(B) subject to the reasonable convenience of the said defendant and without restraint or interference from it, to interview officers and employees of said defendant, who may have counsel present, regarding such matters.

VIII

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the

construction or carrying out of this Final Judgment, for the amendment, modification or termination of any of the provisions hereof, for the enforcement of compliance therewith and for the punishment of violation thereof.

IX

Judgment is entered against the defendants for all costs to be taxed in this proceeding.

Dated February 7, 1956.

s/ DELMAS C. HILL
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Civil Action
No. W-655

UNITED STATES OF AMERICA, *Plaintiff*

vs.

NATIONWIDE TRAILER RENTAL SYSTEM, INC., GEORGE A. CROFT, SR. AND A. E. SIMON, *Defendants*

Order

Upon motion of defendants under Rule 62 of the Federal Rules of Civil Procedure for a stay of the judgment and decree of this Court rendered and entered herein on February 7, 1956, it appearing that plaintiff has no objection thereto, and the Court being fully and duly advised in the premises,

IT IS BY THE COURT ORDERED AND DECREED:

(1) That said judgment and decree of February 7, 1956, should be and is hereby suspended and stayed during the pendency and disposition of defendants' post-trial motions

under Rules 52(b) and 59 of the Federal Rules of Civil Procedure;

(2) That said judgment and decree of February 7, 1956, should be and is hereby suspended and stayed for and during the period from and after its entry on said February 7, 1956, until appeal is perfected therefrom or is perfected from the orders made by this Court upon final disposition of defendants' aforesaid post-trial motions, either or both;

(3) That said judgment and decree of February 7, 1956, should be and is hereby suspended and stayed during the pendency and until the final disposition of defendants' aforesaid proposed appeal;

(4) That on or before February 22, 1956, defendants shall post and file herein a corporate surety bond, to be first submitted to and approved by this Court, in the principal sum of $2,500.00, conditioned that defendants shall diligently present and prosecute their said post-trial motions, and shall satisfy and pay all costs and damages for delay which may be incurred by reason of the pendency of said motions, and conditioned, further, that defendants shall diligently prosecute their said proposed appeal, and shall pay all costs and damages for delay which may be incurred by reason of said appeal.

DATED AND ENTERED at Wichita, Kansas, this 17th day of February, 1956.

/s/ DELMAS C. HILL
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Civil Action
No. W-655

UNITED STATES OF AMERICA, *Plaintiff*

vs.

NATIONWIDE TRAILER RENTAL SYSTEM, INC., GEORGE A. CROFT, SR. AND A. E. SIMON, *Defendants*

Order

Following trial on the merits, this Court filed findings of fact and conclusions of law on July 2, 1955, and entered final judgment on February 7, 1956. After a stay of that judgment on February 17, 1956, defendants moved under Rules 52(b) and 59 (F.R. Civ. Proc.) (1) that the findings of fact and conclusions of law herein be vacated and amended, (2) that this Court grant a rehearing and new trial, and (3) that the final judgment be amended. Grounds for defendants' motions were:

1. As to paragraph 5(a) of the judgment that there is no evidence to support this Court's conclusion of law that defendants engaged in an illegal price-fixing scheme;

2. As to paragraphs 5(b), (c) and (d), and 6 of the judgment that:

(a) the existing practices of Nationwide Trailer Rental System, Inc., are wholly lawful,

(b) these judgment provisions impose a "public utility status" on Nationwide Trailer Rental System, Inc., and

(c) the antitrust laws should not be construed so as "to compel small businesses to merge."

After hearing defendants' motions and upon considering arguments of counsel, the briefs submitted, and the entire

record herein, Now Therefore, It Is Ordered, Adjudged And Decreed (1) that the defendants' motions to vacate and amend this Court's findings of fact and conclusions of law, for rehearing and a new trial, and for amendment of the judgment herein is denied; (2) that the operation of the final judgment in this cause entered on February 7, 1956, be stayed for a period of sixty (60) days after the date of the entry of this order and subsequently for the pendency of any appeal from said judgment to the Supreme Court of the United States if an appeal is taken within said period of sixty (60) days; and (3) that the order of this Court entered on February 17, 1956, providing for a stay of the entry of the final judgment herein is hereby vacated.

Dated: January 7, 1957

s/ Delmas C. Hill
United States District Judge

JUN 25 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~969~~ 114.

NATIONWIDE TRAILER RENTAL SYSTEM, INC., GEORGE A. CROFT, SR., and A. E. SIMON, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal from the United States District Court for the District of Kansas

MEMORANDUM IN REPLY TO APPELLEE'S MOTION TO AFFIRM

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June 25, 1957

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 969

NATIONWIDE TRAILER RENTAL SYSTEM, INC., GEORGE A. CROFT, SR., and A. E. SIMON, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

On Appeal from the United States District Court for the District of Kansas

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MEMORANDUM IN REPLY TO APPELLEE'S MOTION TO AFFIRM

On page 7 of the Government's Motion to Affirm there appears a distortion of the record which needs correction. The Government states:

> "The NTRS members adopted a uniform lease contract (Fng. 21, J. St. 9a), and the amount to be charged for overtime was a printed part of this contract (Fng. 22, J. St. 9a)."

The actual finding reads as follows:

> "A uniform lease agreement was adopted *for use* by the members". (Emphasis supplied)

By eliminating the words "for use" the Government gives the impression that the court affirmatively found that contracts rather than form leases were adopted by the members and that a uniform rate for overtime was part of the adopted contract.

The record and findings show that there was no contract or agreement between the members to use the form. It was prepared and adopted for their convenience in dealing with customers.

In Finding 22 the court found only that the "lease" was actually *"used"* but it did not find that there was any compulsion on anyone to use it.

The question, therefore, is whether the circulation of a form which lists an overtime rate, in the absence of any evidence of agreement or compulsion to follow the price named in the form, constitutes a conspiracy to fix prices in the face of uncontradicted testimony that suggested rates were not followed and that NTRS urged its members to reduce rates in order to meet competition.

The Government admits (Motion to Affirm, p. 7) that the members of NTRS were circularized and told that "those who rent one-way trailers are always on the lookout for a bargain". They were further told that they could not "hope to beat our competition" if they "hold trailers for high rentals". From this the Government comes to the following remarkable conclusion (Motion to Affirm, p. 8):

> "The fact that NTRS urged its members to depart from the rate schedule when necessary to meet competitive rates shows that NTRS itself believed that the scheduled rates were those which *normally* would be charged." (Emphasis supplied)

In making this statement the Government assumes that the normal situation in the one-way trailer business is lack of competition. The record shows to the contrary. Competition is continuous and cutthroat in this field. Thus the only evidence of a conspiracy to maintain suggested rates relied on by the Government is a circular urging members not to follow the suggested rates but rather to meet competition by lowering them.

The second position of the Government in its Motion to Affirm is that NTRS by refusing to take in all comers as members was engaged in a division of the national market for the transportation of personal effects and household goods. It cites cases involving some of our largest American corporations and the *Associated Press* case (Motion to Affirm, p. 9).[1]

With respect to this argument we would concede that if one one-way trailer organization made a deal with another to divide territory, the Government's cases might be relevant. But there is no such evidence in this record. Therefore, none of the cases cited on page 9 of the Motion to Affirm has any conceivable bearing on this case. The only case cited by the Government requiring a membership corporation to admit new members is the *Associated Press* case. To apply that decision to the case at bar it is first necessary to overrule *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926), and then to hold that the rule of the *Associated Press* case must apply to every membership corporation however small. The record shows that the total gross income of NTRS was $2,800,000. Divided among the 750 stations this

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[1] *Associated Press* v. *United States*, 326 U.S. 1 (1945).

means that the average gross income of each station was only $3,733. What the net income was we have no way of knowing. If the members made as much as 25% yearly on their investments it would only be $700,000 total or an average of $1,000 apiece. There was no possible handicap on the organization of competing one-way services imposed either by the appellants or by the economic situation. To compare a case like this with the *Associated Press* case is absurd.

The Government's arguments and admissions in its Motion to Affirm compel the conclusion that the decision of the court below should be reversed.

Respectfully submitted,

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June 25, 1957

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 969

NATIONWIDE TRAILER RENTAL SYSTEM, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of this Court, appellee moves that the judgment of the district court be affirmed on the ground that the questions on which decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from the final judgment entered by the district court on February 7, 1956 (J. St. 13a), adjudging that appellants had combined and conspired to restrain interstate commerce in one-way trailer rentals, in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. 1. The complaint was filed in August 1953. After a

trial at which the evidence consisted of more than 350 exhibits and extensive oral testimony (reported in over 575 pages of transcript), the court, in July, 1955, filed its findings of fact and conclusions of law (J. St. 1a–12a). Following entry of final judgment in February 1956, the defendants filed timely motions to amend the findings and judgment. Both parties elaborately briefed and orally argued the questions raised by these motions, which the court denied on January 7, 1957 (J. St. 20a–21a).

The defendants against whom judgment was entered, the present appellants, are Nationwide Trailer Rental System, Inc. (NTRS), a non-profit Michigan corporation, and George A. Croft, Sr., and A. E. Simon, who at the time of the filing of the complaint were, respectively, the president and the secretary-treasurer of NTRS.

The members of NTRS are companies, partnerships, or individuals engaged in the one-way trailer rental business. Trailers so employed are hitched to and hauled by ordinary passenger automobiles and are used to transport household goods and personal effects. These trailers are rented for a trip from one city to another under a rental contract which obligates the lessee to deliver the trailer to a designated "station" in or near the lessee's destination. The receiving station then arranges, as soon as it can, to rent the trailer for a trip to any other city which has an NTRS station. This process is repeated many times, so that a trailer moves from one place to another without intermediate return to the trailer owner. (Fng. 4, J. St. 2a.)

NTRS is composed of Class A and Class B members, each of which must have one NTRS station. Class A members are those who have ten or more trailers in active use in NTRS, and Class B members those who have less than ten such trailers. B members require the approval of NTRS's board of directors to put ten or more trailers into the system and restrictions are imposed as to the time when a change from B to A status can be made. Every "A" member may have, in addition to its own station, subsidiary NTRS rental stations, which are designated Class C stations. There is no limit on the number of C stations which an "A" member may have, but a C station cannot be established except by authority of NTRS's board of directors. "A" members are alone entitled to vote at membership meetings. (Fng. 17, J. St. 7a–8a.)

At the time of trial, NTRS had 168 Class A members, 63 Class B members, and 524 Class C stations. There were thus more than 750 NTRS stations, located in 46 states and the District of Columbia. (Fng. 27, J. St. 10a).

Under the rental instructions issued by NTRS, a station which receives the trailer of a member, rents it on the first opportunity, collects the amount of the rental, retains 47½%, and transmits the remaining 52½% to the trailer owner.[1] The station sends a

[1] The owner sends 5% of the rental charge to NTRS (Art. VII, Sec. 1 of by-laws, Ex. 303). Accordingly, apart from the 5% which goes to NTRS, rentals are divided equally between the renting station and the trailer owner. The station also has certain duties of inspecting and servicing the trailers which it receives and rents (Ex. 57).

copy of the rental contract to the owner and to the NTRS station in the lessee's destination city. When the trailer is delivered to the latter station, it is required to notify both the owner and NTRS. Under this system the trailer owner is advised at all times as to the whereabouts or use of each of his trailers. (Ex. 57.)

All NTRS stations use and are required to use the uniform rental contract adopted by NTRS. The contract specifies the time within which the trailer is to be delivered to the station in the destination city, which delivery time varies with the distance involved, and specifies the amount to be charged for overtime. (Fngs. 21–22, J. St. 9a; Ex. 303.)

NTRS also furnishes its member stations with what is designated an "Approximate Mileage Rate Schedule", together with a map of the United States zoned for each NTRS station (each zone being approximately 135 miles), so that a station can readily determine the number of zones involved for a movement from any one station to any other. The schedule sets forth a designated rate for each of the 55 zones and for each of eighteen sizes of "open" and "van" trailers. The schedule states that the rates set forth "are only approximate and are left entirely to the discretion of the renting operator", and that they may be varied up or down, "especially where the competition is great or business is very seasonal." The members did not strictly adhere to the price list, did not agree to adhere to it, and were not punished for deviation, but they agreed to circulate the price

list and they used it as a guide in determining rentals. (Fngs. 23–24, J. St. 9a–10a; Ex. 57.)

The by-laws prohibit a member from being connected with a competitive one-way trailer system (Fng. 15, J. St. 5a), and the rental instructions permit a station to rent a NTRS trailer only for delivery to another NTRS station (Ex. 57). If the trailer of a non-member comes into any station, it "shall only be rented back to its owner," in which case the station sends a third of the rental to NTRS (Ex 57, Rental Instructions, Oct. 11, 1954, p. 2). The receiving station keeps half the rental and thus only a sixth of the rental is left for the non-member trailer owner.

The by-laws protect each NTRS station against the competition of another NTRS station within the area served by the existing station. Article IV, Section 3, of the by-laws states (Fng. 15, J. St. 5a–6a):

> A member shall be protected from any [membership] application within his city or immediate vicinity as long as there are no official complaints against him. Unless the member consents, in writing, it shall be the duty of the secretary to deny such applications.

Thus no new station can be established within the protected area of an existing station, except with the latter's consent.

At the time of the trial there were more than 30,000 trailers employed in the United States in the one-way rental business, more than one third of which were NTRS trailers circulating exclusively in its system (Fng. 26, J. St. 10a). In the calendar year

1954, the gross receipts from rentals of NTRS trailers were approximately $2,800,000 (Ex. 304). The gross rentals of U-Haul, the chief competitor of NTRS, were about $1,545,000 in 1953, and its 1954 receipts were estimated to be $2,500,000 (Tr. 920–921).

The court concluded that appellants had engaged in illegal price fixing, (1) by agreeing upon the amount to be charged for overtime, and (2) by adopting and circulating a rate schedule, which action, "while not fixing a rigid price, was such a tampering with prices as is forbidden by the Sherman Act." The court also concluded that appellants had violated the Sherman Act by establishing "exclusive territories for each member" and empowering each member "to prevent any other operator from becoming a member in his area." (J. St. 12a.)

The judgment which was entered prohibits appellants from participating in any plan which requires or suggests that operators of trailer rental stations follow a schedule or suggested schedule of rental rates. It also enjoins them from establishing or allocating "exclusive territories" for such operators, and from preventing any person from carrying on this business at the place of his choosing. In addition, it requires NTRS to admit to membership any one-way trailer operator, provided the applicant agrees to meet his financial obligations and maintain adequate safety standards for one-way trailers. (Judgment, pars. V–VI; J. St. 15a–16a.)

ARGUMENT

The first question raised by appellants is whether the court erred in concluding that they had engaged

in an illegal price fixing scheme (J. St. 3, 9–11). However, the facts amply support the court's conclusion. The NTRS members adopted a uniform lease contract (Fng. 21, J. St. 9a), and the amount to be charged for overtime was a printed part of this contract (Fng. 22, J. St. 9a). While appellants contend that the court did not affirmatively find that the NTRS members used this uniform rate (J. St. 9), finding 22 explicitly embraces the allegedly missing determination. Finding 22 reads in full:

> The current lease form contains a lease agreement *which is used by all operators,* who are members of NTRS. Also, printed on the lease form itself and a part of each leasing contract is a provision for overtime charge and the amount which will be charged therefor. There was no evidence that any operators did not use this lease form. It is supplied to the operators free of charge by NTRS. [Emphasis added.]

We also submit that there was illegal price fixing, under established criteria, when NTRS furnished to all its members a schedule of suggested rental rates, set forth so as to supply a specific rate for each of 18 trailer classifications for each possible movement from one NTRS station to another. At the very least, this schedule provided the price norm, and it necessarily exerted a stabilizing or pegging influence on price. This is manifest by the circular letter of May 10, 1954, from NTRS to all of its members (Ex. 57). The circular stated that those who rent one-way trailers are always on the lookout for a bargain and that the members cannot "hope to beat our competition" if they "hold trailers for high rentals"; and

that NTRS is preparing a zone rate schedule which will place the suggested rates "on a par with our competitors". The circular then declared: "Until this suggested rate schedule is furnished, all members are urged to take the initiative to meet the price demands existing in the various cities and areas." The fact that NTRS urged its members to depart from the rate schedule when necessary to meet competitive rates shows that NTRS itself believed that the scheduled rates were those which normally would be charged.

"Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*" *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223. "And the fact that no penalties are imposed for deviations from the price schedules is not material. * * * Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485, 489. See also, *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 62–63.

Appellants' reliance upon *Maple Flooring Manufacturers' Ass'n* v. *United States*, 268 U. S. 563 (J. St. 10–11), is, we submit, misplaced. What was there circulated was general information about average production costs, freight rates, and past sales and prices. This Court emphasized that the statistics disseminated "do not include current price quotations", and that all reports of sales and prices "dealt

exclusively with past and closed transactions" (*id.* at 573–574). In contrast, the present appellants adopted and circulated suggested prices for *future* rentals.

2. The second question presented by appellants is whether they illegally restrained trade by the rules and regulations which they adopted governing admission of members and establishment of new NTRS stations (J. St. 3, 11–12). The agreement not to permit a new station within the area served by an existing station eliminates competition among members of NTRS in rental of one-way trailers. The agreement to prevent such competition has all the elements of an agreement to allocate trade areas and markets. This Court has consistently held that agreements to allocate or divide markets are illegal *per se*. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 596–599; *United States* v. *National Lead Co.*, 63 F. Supp. 513 (S. D. N. Y.), affirmed, 332 U. S. 319; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 497; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 182; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 241.

We finally note that the judgment requirement that any duly qualified applicant shall be admitted to membership in NTRS has direct precedent in the relief decreed in an antitrust proceeding against a membership corporation, and approved by this Court. *Associated Press* v. *United States*, 326 U. S. 1, 21.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

Respectfully submitted.

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